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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. DEONTE DAJUAN CALDWELL, Defendant and Appellant.	B213235 (Los Angeles County Super. Ct. No. BA322727)

APPEAL from a judgment of the Superior Court of Los Angeles County. Drew E. Edwards, Judge. Affirmed.

William L. McKinney, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

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During a fight outside a downtown dance club, appellant Deonte Dajuan Caldwell assaulted Mark Redman and shot Robert Williams. Appellant was convicted of assault, as to Redman, and attempted premeditated murder with a firearms enhancement, as to Williams. He was sentenced to life imprisonment plus 25 years to life on the attempted premeditated murder count, with a six-month concurrent sentence on the assault count. A third count, which alleged an assault on Williams with a firearm, was imposed and stayed pursuant to Penal Code section 654.[1]

Appellant contends (1) there was insufficient evidence that he committed a premeditated attempted murder, and (2) the trial court improperly instructed the jury regarding aiding and abetting in response to questions from the jury during deliberations, the court should have allowed the reopening of final argument on the question of aiding and abetting, and his defense counsel was ineffective for failing to object to the instructions on aiding and abetting.

We find no error and affirm.

FACTS

1. Prosecution Evidence

Around 10:30 p.m. on May 11, 2007, the two victims, Redman and Williams, arrived at the dance club (the club) with two other friends, Jonathan Wilson and David Flippin. All four of the men were in their mid-20's. Inside the club, Redman danced repeatedly with one woman. Around 11:30 p.m. or midnight a man, later identified as Calvin Gray, complained to Redman that Redman had been dancing with his (Gray's) girlfriend. Redman responded that the woman had been following him around the club. Gray pushed Redman. Redman hit Gray in the face. Another person ordered Redman and Gray to stop fighting. There was no further conflict at that time.

Redman's friend Williams was in another part of the club during the confrontation between Redman and Gray inside the club. Williams drank no alcohol that night and was unarmed, as was Redman.

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[1] Further statutory references are to the Penal Code unless otherwise stated.

Shortly before 3:00 a.m., as the club was closing, Redman, Williams, Wilson and Flippin walked outside together. Redman testified that while he was talking with two women in the parking lot, he heard someone say, "Hey, that's the nigga that hit me in the club." Two men in white T-shirts then ran toward him. One of the men hit him in the jaw. Redman hit the other man. Three more men started punching him. It happened so quickly that he could not identify his attackers. While he was hitting one of the men, he saw Williams struggling with another of them. Williams and that person fell against the window of an SUV, and the window broke. Redman turned and looked to the side at that moment. He heard two gunshots and ran across the street. He did not see the shooting.

Williams testified that when he saw five men attack Redman. He tried to break up the fight and found himself in a "wrestling match" with one of the men. The attackers were all six feet tall, slender African-American males who were wearing white T-shirts and baggy pants. The man with whom he was struggling grabbed him by the arms. They pushed against each other and hit a vehicle, breaking a window. Williams slipped, and the other man fell. "[A] couple of seconds later gunshots were fired." One of the shots hit him. He could not identify the person who shot him.

Police Officers Angel Guerra and Edgar Mejia watched the fight and the shooting from their parked patrol car. They were in the area because there had been problems in the past with fights, traffic and drunk drivers when people left the club at closing time. Guerra was an experienced officer. Mejia was a recent graduate of the police academy. The area was well lit, and the windows of the patrol car were rolled down.

The two officers observed that a fight started after a group of people argued in the parking lot. During the fight, an unidentified man threw a punch at a man the officers later learned was Redman. Three more men, one of whom was appellant, punched Redman. Officer Guerra specifically saw appellant hit Redman in the face. Officer Mejia wanted to leave the patrol car to stop the fight. Instead, because the officers were outnumbered, they stayed in the patrol car and requested back-up.

The two officers saw appellant struggle with Williams, grab Williams by the shoulders, and push him. Williams's head hit the window of the parked SUV, breaking the window. Williams went down on one knee. Appellant was *three to four feet* from

Williams. Appellant pulled out a gun from his waistband, pointed the gun at Williams with his arm extended, and fired the gun twice. Williams ran. Appellant started to chase him while still pointing the gun at him.

The officers left the patrol car when the shots were fired. They aimed their guns at appellant and began to pull the triggers. Officer Guerra ordered appellant to drop his gun. Appellant threw down his weapon and lay down on the ground. He was handcuffed and arrested. His race and clothing were what Williams described. His weapon was an Intratec TEC-22 semiautomatic firearm. It still had 16 bullets in its magazine. A spent bullet casing and a live round of ammunition were also recovered at the crime scene.

After the shooting, Williams lay on the ground nearby, bleeding and in pain from a gunshot wound in his left upper arm. He was transported to an emergency room for treatment. The bullet traveled through his arm. The initial medical evaluation showed "a decrease in sensation" in a nerve. He received follow-up treatment two days later and still had visible scars at the time of the trial.

Appellant's photo was not placed into a six-pack photographic lineup (six-pack), apparently because the two officers saw him shoot Williams. Redman and Williams were later shown a six-pack in which Gray was in the No. 4 position. Redman identified Gray as the person with whom he fought inside the club. Williams was not sure, but he thought Gray resembled the shooter or was one of the people who was involved in the brawl outside the club.

2. Defense Testimony

Dwayne Twyman testified that he went with appellant to the club that night. He and appellant were patted down by the club's security officers before they went inside. They did not have guns. Inside the club, Twyman and appellant met with their friend Calvin Gray. The trio left the club together at closing time. They stood outside and talked with some girls. Another group of men approached and argued with Gray about the girls. One of the men in that group threw a punch at Gray. Twyman came to Gray's assistance and threw a couple of punches. Someone grabbed Twyman from behind and threw him against the window of a parked SUV. The window broke, and Twyman fell to

the ground. He heard a gunshot and ran. He did not see the shooting. He was treated at a hospital for the injuries he sustained when he fell against the window.

Appellant's mother testified that when she saw him after his arrest, he was wearing the same clothing shown in his booking photo, faded blue jeans and a gray sweatshirt with a white T-shirt underneath.

Appellant's best friend and his supervisor from work described his lack of previous violent behavior, his volunteer work with children at a group home, and his excellent performance as a transporter of patients at a hospital.

3. Prosecution Rebuttal Testimony

Two of the club's security employees testified that, due to the club's dress code, appellant would not have been allowed to enter the club while wearing the plain white T-shirt and hooded sweatshirt shown in the booking photo. Guests of the club were thoroughly checked for weapons, but their cars were not checked.

4. Defense Surrebuttal Testimony

Twyman testified that because appellant's clothes did not comply with the club's dress code, Twyman and appellant privately paid a small sum to the security guards at the door, in order to enter the club.

DISCUSSION

1. Sufficiency of the Evidence

Utilizing the appropriate standard of review (*People v. Catlin* (2001) 26 Cal.4th 81, 139), we find that there was substantial evidence to support appellant's conviction.

Appellant's summary of issues indicates that there was insufficient evidence both for attempted murder and for assault, but his briefing actually discusses only the sufficiency of the evidence for premeditated attempted murder, so we limit our analysis to that count.

Appellant contends that there was insufficient evidence that he intended to kill Williams or, alternatively, that if there was sufficient evidence of intent to kill, there was insufficient evidence of premeditation and deliberation. He stresses that the confrontation inside the club involved Redman and not Williams; it was Redman, and not

Williams, whom appellant and his companions attacked outside the club; he shot Williams only once; and the gun still had 16 bullets in it when it was recovered.

The process of premeditation and deliberation does not require an extended period of time for reflection, because a cold, calculated judgment may be arrived at quickly. (*People v. Hughes* (2002) 27 Cal.4th 287, 371.)

The evidence showed that appellant did not have a gun when he was searched by security employees before he entered the club. Inside the club, appellant's friend Gray had a confrontation with Williams's friend Redman. Redman struck Gray in the face after Gray pushed him. About three hours later, when Redman left the club at closing time, he heard someone say, "Hey, that's the nigga that hit me in the club." The jury could reasonably infer that it was Gray who uttered that sentence. Four or five men, including appellant, ran up to Redman and attacked him, evidently to avenge the blow that Redman gave Gray inside the club. Williams struggled with appellant. Appellant pushed Williams against an SUV, breaking a window. Williams fell to one knee. Appellant pulled out a gun from his waistband and fired twice at Williams at close range, shooting Williams once in the upper arm. Williams ran, appellant chased him with the gun still pointed, and appellant threw down his gun because two police officers were about to shoot him.

The jury could reasonably infer from the above evidence that appellant went outside and armed himself with the gun after Redman hit Gray inside the club, and before Redman left the club. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [arming shows planning activity].) Appellant and his companions attacked Redman when he left the club because of what Redman had done to Gray. Appellant changed his target from Redman to Williams during the fight in the parking lot. Neither Redman nor Williams had a weapon. Appellant could not have known in advance that he would be fighting with Williams, but he pulled out the gun and immediately fired twice at Williams from a short distance while Williams was kneeling after falling against the window of the SUV. (See *People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1544, 1552 [pulling out weapon for unprovoked attack on unarmed victim showed intent to kill].) One of the two shots hit Williams in the upper left arm, which could support an inference that appellant aimed

for Williams's upper body. Appellant continued to point the gun at Williams while chasing him and apparently would have fired more shots if he had not been stopped by the police officers. The combination of the motive, the obtaining of the gun outside the club, and the manner in which appellant shot Williams, was sufficient to establish both intent to kill and premeditation.

Appellant argues, however, that according to Redman's testimony, appellant was still struggling with Williams after the shots were fired, so someone else must have shot Williams. We do not read Redman's testimony as appellant does. Like the other eyewitnesses, Redman testified that appellant and Williams struggled prior to, and not after, the firing of the shots.

Appellant relies heavily on *People v. Dickens* (2005) 130 Cal.App.4th 1245. *Dickens* held that, based on evidence that the gun in that case might have discharged accidentally, the trial court did not abuse its discretion when it granted a motion for new trial. Here, in contrast, there was no evidence that the shooting was accidental, and the case is not in the procedural context of the granting of a motion for new trial.

Appellant also argues that questions the jury asked during deliberations show that the jury struggled with the attempted murder count. We summarize that part of the record in further detail.

To avoid confusion, counts 3, 5 and 8 of the amended information were referred to throughout the trial as counts 1, 2 and 3.

For the purpose of the trial, count 2 alleged the attempted premeditated murder of Williams (§§ 187, subd. (a), 664); count 3 alleged an assault with a firearm on Williams (§ 245, subd. (a)(2)), and count 1 alleged an assault by means of force likely to produce great bodily injury (*id.*, subd. (a)(1)), on the other victim, Redman.

Count 1 was based on the evidence that appellant and his companions punched Redman outside the club, just before appellant struggled with and shot Williams. The instructions on count 1 at the conclusion of the trial explained that simple assault was a lesser included offense of the charged crime and set forth the elements of simple assault. The jury eventually found appellant guilty on count 1 of a misdemeanor, assault (§ 240), as a lesser included offense.

During deliberations, the jury requested further instruction about *count 1*. Specifically, it said, "We need clarification on charge #1 lesser charge. [*Sic*.]" It asked if the lesser crime on that count could include "being part of a group that does assault a person," and if a person could be guilty of the lesser crime "even if you are not shown to have taken part in the physical assault, i.e., guilty by association." The trial court responded by rereading the instruction on simple assault and giving two instructions on aiding and abetting, CALCRIM Nos. 400 and 401.[2]

After further deliberations, the jury asked if the perpetrator described in CALCRIM No. 401 had to be identified, or could be unnamed. The court responded, "A perpetrator does not need to be identified. A perpetrator can be un-named."

Thus, the jury's questions and the court's responses all concerned count 1, the assault on Redman. Redman was attacked by a group of people, including appellant. The jury's questions about aiders and abettors had nothing to do with the two counts that concerned the shooting of Williams by a single person.

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[2] CALCRIM No. 400 stated: "A person may be guilty of a crime in two ways: [¶] One, he or she may have directly committed the crime. I will call that person the perpetrator. [¶] Two, he or she may have aided and abetted a perpetrator who directly committed the crime. [¶] The person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

CALCRIM No. 401 stated: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] One, the perpetrator committed the crime; [¶] Two, the defendant knew the perpetrator intended to commit the crime; [¶] Three, before or during the commission of the crime, the defendant intended to aid and abet the perpetrator -- before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime [*sic*]; [¶] And, four, the defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a [] person is present at the scene of a crime or fails to prevent the crime does not by itself make him an aider and abettor."

2. The Aiding and Abetting Instructions

Appellant contends that the trial court improperly instructed the jury during deliberations, as the questions from the jury suggested that the jurors did not believe appellant was the shooter and thought appellant aided and abetted the shooter. The contention lacks merit because the instructions that the trial court gave were an accurate statement of the law of aiding and abetting, which was the subject of the jury's questions. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) Also, appellant again ignores the fact that the judge was giving additional instructions in response to questions about count 1, the assault on Redman, and not counts 2 and 3, which concerned the shooting of Williams. There is no way the jury could have interpreted the additional instructions to mean that appellant aided and abetted a shooting that was committed by someone else.

Appellant further argues that the trial court should not have permitted the "new theory" of aiding and abetting to enter the case while refusing defense counsel's request to give further argument about aiding and abetting. He also maintains that defense counsel was ineffective for failing to object to the giving of aiding and abetting instructions that had no relation to the facts of the shooting. The contentions lack merit because the court's response to the jury's questions was correct, there was no need for additional argument, and there was no basis for an objection by counsel.

DISPOSITION

The judgment is affirmed.

FLIER, J.

We concur:

RUBIN, Acting P. J. LICHTMAN, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.